

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of IRVIN AND
DEBORAH HARRIS.

IRVIN RAY HARRIS,

Respondent,

v.

DEBORAH KAY HARRIS,

Appellant.

E053235

(Super.Ct.No. IND081325)

OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Hanson, Hales, Gorian & Bradford and Erik J. Bradford for Appellant.

Timothy L. Ewanyshyn for Respondent.

Appellant Deborah Kay Harris (wife) and respondent Irvin Ray Harris (husband)
dissolved their marriage by a judgment in 2005. The judgment incorporated the terms of
a marital settlement agreement (MSA) reached between the parties. The MSA recited

that, except as otherwise listed, the MSA disposed of the parties' assets and divided the marital property equally. No specific mention was made of the parties' respective retirement plans. In 2009, wife filed an order to show cause (OSC) alleging that the retirement plans were omitted assets of the marital estate, and asking that the court make orders to divide these assets. The trial court denied the OSC, finding that wife had failed to demonstrate that the retirement plans were in fact omitted assets. Wife appeals this ruling. We affirm.

FACTS AND PROCEDURAL HISTORY

The parties were married in 1986, and separated in 2004. Husband filed a petition for dissolution of the marriage in June 2004. Husband's petition requested confirmation to him of his premarital and postseparation earnings, as well as a division of the marital property.

During the marriage, husband had worked as a border patrol officer. In 2002, husband retired from that employment and began receiving retirement benefits of approximately \$5,470 per month. Husband listed retirement benefits of approximately \$5,500 per month in his income and expense declaration. Wife also was employed during the marriage and earned retirement benefits, but her retirement benefits would be substantially smaller than husband's, or \$688 per month when she retired.

Wife's default was taken in the dissolution action in June 2005, about a year after the action had been filed. Husband filed a declaration in support of the judgment of dissolution, indicating that the parties had entered into the MSA, the terms of which were

incorporated into the judgment. Among other terms of the MSA, it provided that its purpose was “to make a final and complete settlement of the parties’ rights and obligations pertaining to: [¶] 1. Identification and designation of the parties’ respective separate properties and separate obligations; [¶] 2. Identification and division of the parties’ community or co-owned property and community or co-owned obligations; [¶] 3. Spousal support; and, [¶] 4. Other specific matters over which a court of competent jurisdiction shall retain jurisdiction.”

As to the community property obligations, the MSA provided that, “as part of the equal division of community property, . . . they have paid all credit card obligations for any charges that were incurred during the marriage,” that husband was to pay to wife \$455 per month for the leased automobile wife was driving, and that any outstanding credit card debt was the responsibility of the primary cardholder. As to the division of community property, the MSA provided that, “Husband and Wife acknowledge that, except as set forth below, they have already divided their community assets, and that such division, when combined with the division of community debt and the division of assets as set forth below in this paragraph, is equal.” The “division of assets as set forth below,” consisted of the assignment to wife as her separate property, a residence in Hemet, California, and real property in Beaumont, California, as well as the payment by husband to wife of one-half the cash value of husband’s life insurance policy, with husband to retain ownership of the policy.

Each party warranted to the other that there had been a full disclosure of the property owned by each. If it turned out that there was any property owned by one party in breach of the warranty, then the injured party could elect one of three specified remedies. The MSA provided, however, that it was “not intended to impair the availability . . . of any other remedy arising from the undisclosed ownership of any property.”

In addition, the MSA included a provision concerning omitted property: “The Superior Court of Riverside County . . . shall retain jurisdiction to award or assign equally to the parties any assets or liabilities omitted from division under this Agreement which would have been community assets or liabilities as of the effective date of this Agreement. This provision is not intended to impair the availability . . . of any other remedy arising from the omission of community assets or liabilities, including without limitation the remedies set forth in Family Code sections 1101, 2107, 2121 et seq., and 2556.”

Husband executed the MSA in November 2004. Wife signed in March 2005. The judgment of dissolution, incorporating the MSA, was entered and filed July 19, 2005.

In August 2009, wife filed an order to show cause (OSC), asking the family law court to “adjudicate Petitioner’s pension plans.” Wife’s OSC petition relied on Family Code section 2556, which provides that the court “has continuing jurisdiction to award community estate assets . . . to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show

cause in the proceeding in order to obtain adjudication of any community estate asset . . . omitted or not adjudicated by the judgment. . . .” The accompanying points and authorities asserted that the MSA “which became the final Judgment did not state the disposition of the Petitioner’s retirement/pension plans, including, but not limited to, the PERS, FERS and Federal Thrift Savings Plan benefits nor in the Respondent’s FERS and Federal Thrift Savings Plan benefits. [¶] The said assets were omitted/unadjudicated within the said final Judgment and, therefore, the Respondent seeks her requested relief herein. The Respondent is only asking an equal division of the said omitted/unadjudicated assets.”

Husband filed responsive papers stating that the MSA recites that the parties had already made an equal division of the community estate, i.e., pursuant to the provision that the parties “acknowledge that, *except as set forth below*, they have already divided their community assets, and that such division, *when combined with* the division of community debt and the division of assets as set forth below . . . , is equal.” (Italics added.) The items listed in the following paragraphs did not mention the parties’ retirement benefits. “Thus,” husband argued, “any asset not specifically listed must be presumed to be previously distributed.” Husband noted that “Major community assets were divided between the parties without listing them in the agreement, including the sale of the parties’ marital home and division of proceeds from same. The parties also divided their retirement assets without specifically listing them, with each party to retain his or her own retirement benefits.” He further observed that wife did not “mention anywhere

in her papers that she, too, has retirement benefits that were not ‘specifically’ mentioned in the dissolution judgment. . . . Yet, she doesn’t ask that both our retirements be deemed ‘omitted’ and ‘unadjudicated’. . . just mine.”

Wife responded that she was unrepresented during the dissolution proceedings and was not aware of the method by which a retirement plan could be divided; she just assumed that she would receive “my fair share of [husband’s] plan(s) at such time as I reached the age of retirement.” She simply trusted husband, as he was a federal law enforcement officer, and he had handled all financial matters during the marriage. She restated her claim that both parties’ retirement plans were “omitted from and unadjudicated in” the MSA.

The court heard testimony at a contested hearing. Wife testified that husband handled most of the financial affairs during the marriage, and she deferred to his arrangements during the dissolution proceedings.

Wife had had health problems for a couple of years before she was diagnosed with ovarian cancer in June 2004. She underwent surgery and chemotherapy; she felt ill much of the time while the dissolution proceedings were ongoing. She stated she was “more concerned about living than I was about getting a divorce at that time, so I wasn’t paying attention.” Wife was also responsible to arrange caregiving for her father, who suffered from Lou Gehrig’s disease. Inferentially, this obligation also contributed to her distraction.

Wife testified that the parties did not have detailed discussions about how to divide the marital property, but she did agree to sell the family residence, and the proceeds from that sale were divided equally. They were also able to divide the household goods amicably, in what she felt was an equal division.

Wife did not have separate legal representation, but allowed husband to arrange an agreement for the division of property. The parties went to the office of a paralegal to discuss the issues. The paralegal was working from some typewritten notes, and also added handwritten notes during the discussion. Husband had written the typed portions of the notes, based on his understanding of what the parties had agreed after discussion between themselves.

Among the typewritten notes was the statement that, "All bank accounts, financial assets will remain the sole property of the individual." Husband would also agree to execute interspousal transfer deeds, giving wife 100 percent ownership of a house in Hemet, and a house wife was having built in Beaumont.

A handwritten notation concerned the division of the cash value of husband's life insurance policy. Another indicated that "W gets all items in storage in Hemet except for H's computer equip & personal effects." A handwritten remark indicated that "each keep what's in possess[ion]." Yet another remark concerned husband's agreement, at wife's request, to pay her \$500 per month spousal support, which she asked for to help defray the costs of paying for her father's care.

As to the Hemet home, wife testified that she had owned that house before the marriage. During the marriage, she had deeded ownership of the property to herself and husband as community property. Nevertheless, wife testified that she always regarded the Hemet home as her property, despite the community property designation. She claimed that the transfer to community property status was effected for purposes of depreciation. In 2005, pursuant to the paralegal's notes and the MSA, husband did in fact execute a quitclaim deed for the Hemet property to wife as her sole and separate property. Wife stated that there was no conversation that the transfer of the Hemet house as her separate property would be in lieu of any interest in husband's retirement.

As to the notation that each party would keep his or her own "bank accounts, financial assets," wife testified that she "guess[ed]" that she agreed to that, because "It's in there," but clarified that even though retirement accounts are "financial assets," the provision was only about "bank accounts." At the meeting with the paralegal, there was never any discussion of retirement accounts. Wife testified that she "never thought about" what would happen to the retirement benefits as a result of the divorce, and maintained that "[t]here was no understanding," in the settlement of the divorce proceedings as to what would be done about the retirement benefits.

As to each party keeping what was in her or his possession, wife denied that such a provision was in the actual agreement. Wife agreed that husband had delivered to her items from the storage unit in Hemet, but she was not sure whether she received all that

she should have. She also agreed that the life insurance cash value had actually been divided.

Wife testified that, when she signed the final MSA agreement, prepared after the meeting with the paralegal, she did not read over the document in depth. Instead, she had always thought of husband as “a trustworthy kind of guy,” so she “kind of relied on him.” She never sat down and did an accounting of the assets. Wife acknowledged that she had had the MSA document for some time before she signed it, and she did in fact sign it. She did not read it, however, particularly not the provision that stated that she had had time to have the MSA reviewed by an attorney and to obtain independent legal advice about its contents.

Husband testified that the Hemet house, which wife had owned before the marriage, was transferred to community property ownership during the marriage. The amortization on the existing mortgage was negative, so that the amount owed was increasing. Using their joint credit, the parties refinanced the Hemet home, paid off the existing mortgage and replaced it with a new mortgage of \$74,000. The new mortgage was paid off during the marriage. Pursuant to the MSA, husband deeded the Hemet property back to wife without getting any sort of credit for the refinancing or paying off of the Hemet home, or for the taxes paid or other expenses paid on that home during the marriage.

The MSA provided that each party had confirmed as his or her separate property, “any IRA account” in their respective names. Husband testified at the hearing that

neither party had ever opened a conventional IRA account, but that husband's retirement benefits consisted of an annuity option, which paid about \$5,500 per month. Husband stated that, "The only IRA that I have ever had is my CSRS [Civil Service Retirement System] annuity," which he called an "IRA" because, "It's my individual retirement account. That's individual retirement account, IRA."

The parties had owned some savings bonds. Husband testified that each party kept the bonds that were in his or her own name, although husband's were worth \$3,000, while wife's were worth \$5,000.

Husband indicated that the MSA provision, that the parties had equally divided the community property assets, other than as specifically mentioned, covered the parties' division of the proceeds from the sale of the family home, the division of the savings bonds (each retaining his/her own), tax returns (husband paid the taxes, wife kept the refund), the division of the furniture and furnishings, and the division of the retirement benefits (again, each to retain his/her own). In other words, there were several assets not specifically mentioned which the parties had agreed to divide.

Husband did acknowledge that his retirement income was greater than wife's expected retirement benefit. He had always earned more during the marriage than she did. Husband had worked over 34 years, including 18 years during the marriage, upon which his retirement was based. His monthly annuity payment from his retirement was about \$5,500. Wife had paid into her retirement plan for approximately five to eight

years during the marriage. As of the time of the hearing, if she retired then, the monthly amount paid by wife's retirement annuity would be \$688.

Wife's counsel argued that the present value of husband's retirement plan was \$1.28 million, of which 48 percent was community property. Wife's share of the community property portion would be \$308,977. Husband's retirement represented the most substantial asset of the entire community property estate, and yet was not mentioned in the MSA. Husband's retirement benefits would provide him with income of \$60,000 per year or more, whereas wife's current retirement benefit would provide her an income of only \$8,256 per year. The statement in the MSA that the parties had divided their assets equally, could not be true if the agreement purported to take into account husband's retirement benefits; therefore, counsel argued, the retirement benefits of both parties must have been omitted from the property division.

Husband's attorney countered that the catch-all provision of the MSA was fully sufficient to include the retirement benefits. Family Code section 2556 applies only to assets which are truly "omitted," but the retirement benefits of the parties were not omitted or unadjudicated, even if they were not specifically mentioned. Both parties were well aware of the existence of the retirement benefits. Wife at all times knew that husband had a retirement plan and that he was already receiving payments on retirement status. Husband's retirement did not represent an after-discovered or forgotten asset. The catch-all provision admittedly covered a number of other community property assets which were also not specifically mentioned in the agreement, and which wife conceded

had been equitably divided. Another provision of the MSA confirmed to each as separate property any IRA in either party's name; whether or not an IRA is equivalent to "retirement," that provision signaled that each party agreed to keep separately these retirement instruments held in their individual names. Counsel urged that the MSA might be "an unusual agreement, but it is their agreement."

The court took the matter under submission, and later issued a ruling denying wife's OSC petition. The court's decision recited that "The MSA does not specifically mention either party's pension," but that "The parties did in fact divide assets that were not mentioned in the MSA." Wife was at all times aware of husband's pension, as he started receiving benefits during the marriage. The burden of proof was on wife to show that the pension was an omitted or unadjudicated asset, but the court found that wife had failed to meet this burden. The court therefore denied the OSC.

Wife filed a timely notice of appeal.

ANALYSIS

I. Standard of Review

A marital settlement contract, like the MSA here, is a contract between the parties. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398.) It is therefore subject to the general rules applicable to the construction of contracts. (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) "The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible.

[Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

Where the meaning cannot be determined from the words alone, parol evidence may be admitted if the language is ambiguous. “The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is ‘reasonably susceptible.’” (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) “The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine ‘ambiguity,’ i.e., whether the language is ‘reasonably susceptible’ to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is ‘reasonably susceptible’ to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the [document].” (*Ibid.*)

Normally, the interpretation of a document presents a question of law, which we review de novo. (*Brown v. Labow* (2007) 157 Cal.App.4th 795, 812.) “‘Where, however, extrinsic evidence is properly received, and such evidence is conflicting and conflicting inferences arise therefrom, the appellate court will accept or adhere to the interpretation adopted by the trial court provided that that interpretation is supported by substantial evidence.’” (*Estate of Williams* (2007) 155 Cal.App.4th 197, 205-206.)

In this case, the MSA made no express mention of the parties' retirement plans. The parties presented conflicting factual statements, which would support conflicting inferences on the proper interpretation of the MSA with respect to the retirement plans. We therefore apply the more deferential substantial evidence standard.

II. The Trial Court's Interpretation of the MSA, as Having Already Divided the Retirement Assets, Was Reasonable and Supported by Substantial Evidence

Wife argues that the family law court had jurisdiction to divide the retirement plans under Family Code section 2556. That section provides that community property assets which "have not been previously adjudicated by a judgment in the proceeding," are subject to the jurisdiction of the family law court. The MSA of the parties also expressly provided that the family law court would "retain jurisdiction to award or assign equally to the parties any assets or liabilities omitted from division under [the MSA] which would have been community assets or liabilities"

The issue is whether the retirement plans were in fact omitted from the MSA or were unadjudicated by the provisions of the judgment. Wife argues that she presented evidence sufficient to find that the retirement plans were unadjudicated or omitted.

Wife raises the following points of evidence: It is undisputed that the MSA itself does not specifically mention the parties' respective retirement interests. The catch-all clause, i.e., that the parties had already divided their community assets, stated that the parties agreed that such division had been "equal." However, wife presented factual evidence at the hearing to show that the community estate had not been divided equally,

if husband was allowed to retain all interest in his retirement plan. Husband's retirement plan was the most substantial asset in the entire community property estate. Husband had claimed that wife had received a greater share of the community property estate, but wife attempted to show that this was not correct. For example, even though husband received no interest in the Hemet home, wife maintained that the Hemet house was really her separate property. She testified that the transfer of that home to community property had been for accounting purposes only. It was undisputed that she had owned that home separately before the marriage, and that her ailing father had occupied the home both during and after the marriage. She testified that both parties had always regarded that home as belonging to her. The representation in the MSA, that all unmentioned assets had been divided equally, would be rendered untrue if each party kept his or her own retirement benefits, and thus wife concluded that the catch-all provision could not have contemplated the retirement plans at all. Wife also offered testimony that she never thought about the retirement plans, and just assumed that she would receive something when she reached retirement age. She also gave general testimony about her illness, her preoccupation with caring for her ill father, and her lack of legal representation.

Wife argues that, "Since the only community property not mentioned in the judgment that was purportedly divided by the omnibus provision was divided equally other than the retirement, and there is no mention of the parties' respective retirement assets in the MSA, it is a stretch to suggest the retirement interests have been 'divided' pursuant to that omnibus clause. Further, the question must be asked why there is a

provision in the parties' MSA as to omitted assets. If there was no question that all unmentioned property had been divided by the omnibus clause, there would be no reason for the MSA to include such a provision."

Wife's argument—in essence, that the evidence was sufficient to support a ruling in her favor—reverses the presumptions under the standard of review. The question is whether there was sufficient evidence to support the trial court's determination, not whether there was substantial evidence to support a different ruling.

There was substantial evidence to support the trial court's conclusion that wife failed to meet her burden of proving that the retirement plans were in fact omitted or unadjudicated community property assets.

Evidence at the hearing showed that there were other assets which were not specifically mentioned in the MSA which were divided, such as the proceeds from the sale of the family home. The proceeds from the sale of the family home were divided equally, as was the value of husband's life insurance policy. Wife also agreed that the parties had been able to divide their household goods equally.

Other evidence also showed that some of the parties' assets and liabilities were divided in an agreeable manner, even though not in mathematically equal portions. For example, husband paid off all of the credit card debt, and he paid the income tax liability, while wife received the income tax refund. Wife also received 100 percent ownership of the Hemet home, notwithstanding the community property contributions to paying off the mortgage on that home. She also received the rent on the home, consisting of the

governmental housing allowance paid on behalf of her disabled father, who occupied the home. Wife received a leased vehicle, on which husband made the lease payments as spousal support.¹

Other provisions of the MSA made divisions or confirmations of property without apparent regard to mathematical equality. For example, the MSA confirmed to each party the bank accounts in his or her own name, and any “IRA” accounts in their individual names, without calculation of any amounts.² Husband testified that each party kept any savings bonds in his or her own name, although the values were unequal.

The MSA contained provisions highly suggestive that the retirement plans were intended to be covered in its distribution of property. The MSA recited that the agreement was intended to effect a full and complete disposition of all of the parties’ property and obligations, that each warranted full disclosure to the other of all property and obligations, and that each party disclaimed any interest in the estate of the other. The evidence was undisputed that the existence of the retirement plans was fully known to

¹ At the termination of the lease, wife opted to purchase the vehicle for \$18,000. Husband received a truck, which he sold for \$1,500. Husband also made spousal support payments of \$500 per month. Even though their monthly incomes were comparable, husband agreed to make these payments to assist wife in defraying the costs of caring for her father. In the interval between the judgment and the hearing on the OSC, husband had paid approximately \$40,000 in spousal support.

² Wife had testified that she had waived any survivor benefits from husband’s retirement; she and husband had contemplated that he would take the additional increment of retirement benefits to open an IRA account. Under the provision of the MSA, wife understood that husband would keep the IRA in his name, while she had none of her own. In fact, husband had never opened such an account, but wife knew that the MSA would have assigned all the IRA funds to husband.

both parties. Neither husband nor wife ever sat down to make an accounting of all the assets and debts. During the discussion with the paralegal, wife testified that the paralegal had asked, “Are there any other assets?” Wife brought up the cash value of the life insurance policy, and a provision for spousal support. The final MSA was changed to include these requests. Wife never brought up or mentioned the retirement plans during that discussion. The notes of the meeting indicated that the parties had discussed and agreed that each would keep his or her own bank accounts and “financial assets.” Wife testified that she “guess[ed] [she] did” agree to that provision, because “It’s in there,” although she also testified that she interpreted that provision to refer solely to bank accounts. Wife had a copy of the MSA for several months before she signed it, but never read it through and never consulted an attorney.

Husband testified that, before the marriage, he asked wife if, in a divorce, she would “go after” his retirement. Wife “plainly stated, no, she would not.” Husband also testified that, during the dissolution proceedings, he told wife, ““Okay. This is the way it’s going to be. I won’t screw with your retirement; you don’t screw with mine.”” Wife denied having made any such statement, but this was a matter of credibility resolved by the trier of fact.

In sum: The MSA recites that all of the parties’ estate and interests are intended to be covered by the agreement; both parties agree that at least one unmentioned asset was in fact divided under the omnibus clause; both parties at all times knew of the existence of the retirement plans of each party; the notes of the discussion with the paralegal, which

was intended to formulate the terms of the MSA, indicated that each party was to keep his or her own bank accounts and “financial assets”; the paralegal affirmatively asked if there were any omitted assets, and wife brought up the life insurance policy and spousal support, but made no mention of the retirement plans; not all assets (or debts) divided under the MSA were divided with strict mathematical equality. All the circumstances tend to support the trial court’s factual finding that the omnibus provision of the MSA was intended to, and did, cover distribution of the retirement plans, with each party to keep his or her own. Thus, wife failed to carry her burden of proving otherwise, i.e., that the retirement plans were truly omitted or unadjudicated assets.

Although, as wife correctly asserts, the family law court retains jurisdiction to litigate the disposition of community property assets omitted from or unadjudicated in a family law judgment (citing *Henn v. Henn* (1980) 26 Cal.3d 323, 330), that jurisdiction is also so limited: “[T]he family court’s power under [Family Code] section 2556 is limited to assets which have not been previously adjudicated. The family court’s power is also limited to community property and community liabilities; the statute gives the court no power to make an award with respect to a party’s separate property or separate liabilities.” (*In re Marriage of Hixson* (2003) 111 Cal.App.4th 1116, 1123.) Further, “The statute does not authorize a ‘modification’ of the prior property division judgment or otherwise allow the court to act on community estate assets . . . already disposed of by a prior judgment. [See *Marriage of Simundza* (2004) 121 CA4th 1513, 1521-1522 . . .].”

(Hogoboom & King, Cal. Practice Guide: Fam. Law (The Rutter Group 2011) ¶ 17:347, p. 17-86.)

In re Marriage of Simundza (2004) 121 Cal.App.4th 1513 (*Simundza*), referenced in Hogoboom and King, *supra*, is instructive. There, the MSA had provided that, as a division of the husband's retirement benefits, he was to pay the wife \$200 per month from his retirement benefits. His retirement benefits had initially been estimated at about \$400 per month, but had increased significantly over the years. The wife urged that she should be entitled to some share in the increase, because the intent had been to divide the retirement benefits equally. The wife analogized her situation to *In re Marriage of Melton* (1994) 28 Cal.App.4th 931, in which the parties had agreed that each spouse would get "half" of the husband's retirement income, calculated at \$119 per month. As the husband's retirement income had increased, that increment was treated as an "unadjudicated" asset. The salient feature in *Melton* however, was the express provision that each party would get "half" of the retirement. In *Simundza*, there was no such expression. Instead, the MSA expressly provided that the wife was to receive \$200 per month, paid by the husband from "his retirement." The express terms of the MSA included all of the retirement income, so that there was no increment which had been unadjudicated. Despite the apparent unfairness of awarding the wife an amount different from half of the retirement benefits, the *Simundza* court noted that the parties had expressly provided for specific percentages (one-half) in other portions of the MSA. "Therefore, the parties knew how to allocate to Barbara one-half or another percentage

interest in Richard's pension benefit, but did not do so in the stipulated judgment.”

(*Simundza*, at p. 1521.) The parties in *Simundza*, like the parties here, had created their own agreement without the benefit of counsel. Their MSA contained provisions which reflected a division other than strict mathematical equality on some issues. (*Id.* at p. 1517 [The parties “‘had give and take on a few things in the settlement. She took the newer & better car, a grand piano, most of the furniture and very little child support ([Richard] had the kids).’”].) The trial court had commented that the parties had conducted negotiations, and “‘there’s a number of reasons why people get into these plans or into these kinds of judgment negotiations which aren’t necessarily set forth with any specificity in the judgment, and I don’t really feel compelled to look through . . . as to what parties had in mind when they signed off on this judgment.’” (*Ibid.*) Thus, the parties could well have had reasons to divide the property as they did, even if it did not reflect an equal division of a particular asset. “California recognizes the objective theory of contracts [citation], under which ‘[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation’ [citation]. The parties’ undisclosed intent or understanding is irrelevant to contract interpretation.”

(*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th 944, 956.)

The result here follows from that in *Simundza*. The language of the contract controls over unexpressed and undisclosed intentions. The omnibus clause clearly stated that the intent was to dispose of all of the parties’ property and estate, and it did so in

language which was sufficient to cover unspecified assets. Wife herself agrees that the omnibus clause in fact did serve to dispose of unmentioned assets (sale of the family home). As to the suggestion that the MSA provision for omitted assets would be superfluous, unless construed to cover the retirement plans, we reject the contention. Family Code section 2556, as well as the MSA provision for omitted assets, would be fully applicable to assets which were either concealed, or forgotten, and thus had not been contemplated by the dispositions made in the MSA. There was no evidence that any party had been unaware of, or had forgotten, the retirement plans. Husband had already retired before the date of separation. His retirement benefits were the primary source of his income, from which he was expected to pay spousal support, for example. The parties had agreed to divide some assets unequally, and to divide them unequally in some cases by retaining particular assets held in the party's individual name. Nothing forbids making such an agreement, and the language of the MSA here is sufficient to accomplish that result with respect to the retirement plan benefits.

DISPOSITION

Wife failed to carry her burden of showing that the retirement plans were truly “omitted” or “unadjudicated” assets. Substantial evidence supports the trial court’s finding on this issue. The order denying wife’s OSC petition is affirmed. Husband is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P.J.

We concur:

KING J.
CODRINGTON J.